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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1296

DONALD O. SHREVES,

Petitioner-Respondent,

vs.

CELIA J. SHREVES,

Respondent-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

GLADYS TOWLES ROOT,
212 South Hill Street,
Los Angeles, Calif. 90012,
(213) 624-9557,
Attorney for Respondent-Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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DONALD O. SHREVES,

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vs.

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Respondent-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the California Supreme Court entered on or about November 28, 1973.

Citation to Opinion Below.

The unpublished opinion of the Court of Appeal of the State of California, Second Appellate District, Division Four, denying Petitioner's contentions is attached hereto as Appendix "A".

Jurisdiction.

The judgment of the Supreme Court of California printed in Appendix "B" hereto was entered on or about November 28, 1973.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

1. Is it a denial of legal protection of the laws for the California statutes and cases to deny to spouses the protection of the Statute of Frauds' requirement of a writing evidencing transfers of real property which protection is afforded to all other classes of persons?

2. Was the award of spousal support an abuse of discretion when the Petitioner worked supporting the Respondent for the entire twenty-nine (29) years of marriage, except about one year, and now Respondent has income from painting, federal disability, and Petitioner is practically unemployable by age and illnesses?

3. Was the Petitioner deprived of due process by incompetent representation when her trial attorney failed to introduce evidence of her $14,000.00 payments during marriage for art lessons for Respondent and her $14,000.00 payments during marriage of legal fees for obtaining Respondent's federal disability award?

4. Was the Trial Court in error in holding that the real property residence was Community property when three years before the Court held it was Joint Tenancy, there was totally uncorroborated testimony of the husband to an agreement to change the property from Joint Tenancy to Community property upon the party's remarriage?

5. Is it a violation of due process and equal protection of the laws for California to have statutory presumption which affects the burden of proof and which presumptively changes a Joint Tenancy residence of

spouses to Community property thus aiding and effectively depriving one party of contractive rights of survivorship?

6. Is it an abuse of discretion for the Court of Appeal to deny a Petition for Rehearing when the attorney for Petitioner-Appellant had the fact of Respondent's testimony as to the alleged oral transmutation of the real property only about one month prior to the oral hearing and after opening, first supplemental, and Respondent's brief was filed in the Appellate Court and thus the significance of making a challenge to the constitutionality of the oral agreement was not known until that time?

Constitutional Provisions, Statutes and Rules Involved.

The Constitutional provisions involved are the Fourteenth Amendment to the U.S. Constitution due process and equal protection clauses. The statutes involved are *California Civil Section 5103* as applied and *5110* as written. These provisions are printed in Appendix "B" hereto.

Statement (History).

Petitioner's husband sought the dissolution of their marriage. The Trial Court granted an interlocutory decree of dissolution, awarding spousal support to the Petitioner, dividing the community property of the parties. Petitioner appeals the judgment. The parties had been married a total of twenty-nine (29) years; the Petitioner supported the Respondent who became a paraplegic twenty-two years, prior to service connection. Pe-

titioner built a house taken in Joint Tenancy, and acquired property in Joint Tenancy.

The Court of Appeal sustained the judgment of the trial court on October 2, 1973. On October 17, 1973 Petitioner filed a Petition for Rehearing Request to file Supplemental Brief for the reason that the Petitioner's attorney didn't know about the Respondent's testimony concerning the oral transmutation until one month before oral argument, after the opening brief, first supplemental brief, and thus the need to attack the constitutionality of said alleged agreement was known only then.

The rehearing was denied October 23, 1973.

A petition for hearing was made to the Supreme Court of the State of California by Petitioner, but it was denied.

REASON FOR GRANTING THE WRIT.

This petition raises substantial and important questions concerning the property rights and spousal support rights of married persons in California. This court has not passed upon these issues of property rights of spouses. California spouses are denied the equal protection and due process of law by the court application of:

1. *California Civil Code Section 5103* which permits spouses to enter any transaction or engagement with each other which either might make if unmarried. The California Courts have held oral transmutations from and to separate real and personal property to and from Community property may be made. The said oral agreement is fully performed when agreement is made.

Wood v. Security First National Bank, 46 Cal.2d 697, 299 P.2d 657 (1956); *Sears Estate*, 182 Cal. App.2d 525, 6 Cal.Rptr. 148 (1960); *Dickson v. Dickson*, 225 Cal.App.2d 752, 37 Cal.Rptr. 718 (1964).

California also has a Statute of Frauds provision, California Code of Civil Procedure Section 1091, which provides that conveyances of real property must be evidenced by a writing or sufficient memorandum.

Security of estates and avoidance of perjury and fraud are objects of the statute.

Ramsey v. Chilson, 57 Cal.App. 785;
Sherwood v. Lowell, 34 Cal.App. 365.

This Code Section protects all classes of persons except California spouses in transactions between the other spouse.

California Civil Code Section 5103 as applied by the courts singles out for discrimination, and thus un-

equal protection of the laws, those persons who fit into the above classification of California spouses in transactions involving real property between the other spouse.

A legislative classification must be reasonable and not arbitrary, and a classification attempted, in order to avoid the constitutional prohibition must be founded upon pertinent and real differences as distinguished from irrelevant and artificial ones, *State v. Sunset Ditch Co.*, 145 P.2d 219, 48 N.W. 17 (1944).

The married person needs just as much protection as the unmarried person to protect her from fraud or perjury of her spouse. The facts in the case demonstrate the need for the equal protection of married persons under the Statute of Frauds. Here, the wholly uncorroborated statement by one spouse to an alleged oral transmutation of real property was effective in depriving the appellant of her survivorship rights under joint tenancy in violation of the equal protection of the laws.

It is just this type of uncorroborated statement against which the Statute of Frauds protects.

The general rule is that the State must, if it draws distinctions between persons, classify persons so that at a minimum, classification bears a rational relationship to a legitimate public purpose.

> *In re King*, 3 Cal.3d 226, 90 Cal.Rptr. 15, 474 P.2d 983;
>
> *Board of Education v. Alliance Assur. Co.*, 159 Fed. 994.

In this case the State is attempting to protect the contract of married persons enabling them to make informal contracts, but the result is that one-half of the

spouses can lose all their property without due process by one simple uncorroborated statement by the other spouse, and thus as applied, the statute results in discrimination without any rational connection to a public purpose. A valid public purpose cannot be to deprive one-half (½) of married property owners of their property. More corroboration should be required to make the statute constitutional.

2. The court abused its discretion and thus the holding is in violation of the process in awarding the wife only $400.00 per month for six (6) months, $350.00 per month for one (1) year, $300.00 per month for two (2) years, $250.00 per month until death, remarriage or reaching age of 62 years when the parties had been married for twenty-nine (29) years, petitioner had worked and supported her paraplegic husband during marriage for all but about one year of the entire period, building a home, acquiring property. During that time she had also paid for art lessons, legal fees for obtaining his tax-free federal disability monthly payment of $1,250.00 per month.

Now, the husband has income from art lessons also and the wife is practically unemployable because of age and ill health.

The case most directly on point in this issue is

In re Rosan, 24 Cal.App.3d 885, 101 Cal.Rptr. 295 (1972) which held:

> "the marriage was 17 years during which the spouses enjoyed a high standard of living and the spousal support was $400.00 per month for one year, $300.00 the next year, $200.00 the third year, and nothing thereafter, and wife had no special training."

California Civil Code Section 4801 gives the court authority to grant spousal support having regard for the circumstances of the parties, duration of marriage, ability of supported spouse to engage in gainful employment. Looking at these factors the court abused its discretion, especially when the wife made such a contribution to the community property for so long and is in such need of support now.

3. The incompetence of Petitioner's attorney was so extreme that it resulted in the deprivation of Petitioner's property in violation of due process clause of the U.S. Constitution. Petitioner's contribution to the community property was more extensive than that presented to the Trial Court (during marriage Petitioner paid about $14,000 00 for Respondent's art lessons, $14,-000.00 for legal fees used for obtaining his federal service disability. The trial attorney was informed of these facts and failed to introduce them into evidence. Also, the Petitioner strongly asserted at trial that there was no transmutation of the Joint Tenancy property to Community property and yet her attorney in the answer, by asserting at $6,000.00 separate property interest in the house thereby admitted that the remainder of the real property was community property, a fact commented on by the Trial Judge in his decision [Trial Transcript, p. 24, lines 22-26].

Said errors by the Trial Attorney were so flagrant as to make the judgment of the court a violation of due process of the constitution.

4. The Court erred in its decision that the real property taken in joint tenancy, held by a prior divorce court about three years earlier to be a joint tenancy, when the only evidence of change of form was the

wholly uncorroborated statement of Respondent, vigorously denied by the Petitioner.

There is no substantial basis for said decision, *Gularte v. Martins,* 65 Cal.App.2d 817, 151 P.2d 570 (1944).

5. If California trial court based its decision that the real property was community property on *California Civil Code Section 5110,* which creates a presumption real property acquired by California spouses during marriage in joint tenancy is community property, the decision is based on a statute which is in violation of due process and equal protection clauses of the U.S. and California Constitution.

Said statute creates a presumption which operates to require the Petitioner to prove the nonexistence of the presumed fact, that the property is community property, *Baron v. Baron,* 9 Cal.App.3d 933, 939, 88 Cal. Rptr. 404 (1970) and thus the statute operates to arbitrarily and capriciously aid one-half of the persons and deprive the other half of the persons of their rights of survivorship in violation of due process clause.

Said action is arbitrary and capricious in that the law is not reasonably related to its purpose, *Prentis v. National Airlines,* P.C.N.J., 112 F.Supp. 306 (1953). Its purpose is protecting rights of spouses, but it results in injury to fifty percent (50%) of them.

Real property is unique and is always subject to the remedy of specific performance. *Reimer v. Hermann,* 180 P.2d 385, 79 La.2d 543 (1947).

Alternates are available such as compensating the party out of possession until the termination of the joint tenancy.

The equal protection clause is violated by the statute in that the act operates to discriminate against an arbitrary class of persons in California, persons married who acquire real property residences.

6. The Court of Appeal abused its discretion and thus violated due process in not granting a rehearing for Petitioner to submit a supplemental brief. The Petitioner was only informed of the Respondent's allegation of the oral transmutation about one month prior to the oral argument after the opening, first supplemental, and Respondent's brief were filed. Thus, the necessity for attacking the legal effect of oral transmutations was not known until that time.

Conclusion.

Petitioner hereby requests a new trial in the above-entitled case on the issues of division of property, especially real property, and on spousal support for the reason that the trial court erred in its holdings.

Dated: February 21, 1974.

Respectfully submitted,

GLADYS TOWLES ROOT,
Attorney for Respondent-Appellant.

APPENDIX "A."

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

In re the Marriage of Donald O. Shreves, Petitioner and Respondent, and Celia J. Shreves, Respondent and Appellant. 2d Civ. No. 40176, S. C. # D 787331.

Filed: Oct. 2, 1973.

APPEAL from a judgment of the Superior Court of Los Angeles County. Philip Erbsen, Temporary Judge.* Affirmed.

Gladys Towles Root, for Respondent and Appellant.

Edwin S. Saul, for Petitioner and Respondent.

Petitioner Donald O. Shreves sought the dissolution of his marriage of respondent Celia J. Shreves. The trial court granted an interlocutory decree of dissolution, awarding spousal support to the respondent wife and dividing the community property of the parties. Respondent wife appeals the judgment.

The parties originally married in Missouri in 1942. That marriage was terminated in Los Angeles by entry of a final decree of divorce in 1968. On June 15, 1968, the parties remarried each other. On May 4, 1971, the petition for dissolution was filed in the present case.

During the first marriage of the parties, the petitioner became a paraplegic. The parties built a home on a lot at 1849 Maltman, Los Angeles. The home was de-

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*Pursuant to stipulation, see Const., art. VI, § 21.

signed specifically for petitioner's use in a wheelchair; it did not contain steps, but had ramps and special plumbing fixtures. At the time of trial, the house was valued at $40,000, with an existing encumbrance of $6,314. The husband listed the home in his dissolution petition as community property; the wife, in her response, claimed a $6,000 separate interest in the property.

Petitioner testified that while the property had been held by the parties as joint tenants[1] prior to 1968, the parties orally agreed at the time of their reconciliation and as a condition of reconciliation that the property would be community. Respondent wife emphatically denied that she and the petitioner had ever made such an agreement.[2]

The husband further testified that he received disability and social security benefits of approximately $1,250 per month. There was evidence of his increased expense in maintaining himself, due to his physical condition. The wife testified that she was unemployed, and had various medical problems which prevented her from seeking employment, although she had worked as a secretary for a substantial part of the time she was married to the petitioner.

The trial court found that the residence at 1849 Maltman Avenue was community property with a net

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[1]The trial court had before it the interlocutory judgment of divorce granted in previous proceedings in 1968, which declared that the Maltman Avenue property was held by the parties in joint tenancy, and awarded each party one-half interest in the property, as their separate property.

[2]Respondent's claim of a separate $6,000 interest in the property set forth in her pleading was not set forth in testimony at trial, but apparently was based on her initial purchase from her separate funds of the lot upon which the house was built.

equity of $33,686. It awarded the home to petitioner husband. It awarded various shares of stock to the respondent, and further ordered petitioner to pay respondent the sum of $11,207 within six months, as a means of equalizing the division of the community. The trial court also confirmed the status of certain shares of stock as the respondent's separate property. Spousal support was awarded to the respondent in the following manner: $400 per month for six months; $350 per month for one year; $300 per month for two years; and $250 per month to continue until the respondent reached the age of 62 years, or died or remarried, whichever occurred first. The court specifically provided that jurisdiction over spousal support would not extend beyond the respondent's 62nd birthday.

Respondent contends on this appeal that the trial court erred in determining that the residence at 1849 Maltman Avenue was the community property of the parties rather than joint tenancy property. Our scope of review of this factual determination by the trial court is limited to a consideration of the evidence in the light "*most favorable to the prevailing party,* giving him the benefit of every *reasonable inference,* and *resolving conflicts* in support of the judgment." (6 Witkin, California Procedure, 2d ed., "Appeal," § 245, p. 4236.) If there is substantial evidence in the record in support of the factual finding, we are compelled to uphold it.

In the instant case, the testimony with respect to the property was in conflict. The petitioner testified to an oral agreement between the parties that their reconciliation would proceed on the basis that the property was community in nature. A husband and wife may orally agree to change the character of property from joint tenancy to community. (*Woods v. Security Na-*

tional Bank, 46 Cal.2d 697; 10 Cal.Jur.2d, "Community Property," §§ 56-58.) The petitioner's testimony was supported, at least in part, by respondent's pleading, wherein she disputed only $6,000 of the property's community character. While the respondent denied the existence of any oral transmutation agreement, the trial court chose to believe the petitioner. Since we have concluded that there was substantial evidence to support the trial court's determination, we will not disturb on this appeal the finding that Maltman was community property.

Petitioner assumes that the trial court relied upon Civil Code section 5110 in finding the property to be community, and then mounts what purports to be a constitutional attack on that section of the code. Civil Code section 5110 provides, among other things, that "when a single family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single family residence is the community property of said husband and wife." The respondent claims that the trial court is without jurisdiction to apply section 5110 because the section discriminates against persons acquiring joint tenancy property during marriage, and the presumption contained in section 5110 operates to deprive persons of joint tenancy interests, including the right of survivorship, by characterizing them as community, and thus there is a denial of equal protection of the laws.

We need not now consider the merits of respondent's constitutional argument as we have determined that the trial court's judgment was supported, not by the pre-

sumption of section 5110 (which is not evidence; Evid. Code § 600; *Baron v. Baron,* 9 Cal.App.3d 933, 939), but by substantial evidence.

Respondent further argues that the award of spousal support was so unfair as to constitute abuse of judicial discretion, and urges reversal of the judgment on that ground. It is well settled under the Family Law Act of 1970 that the trial court retains discretion in making awards of spousal support. It may consider many and varied factors with the exception of fault. (Civ. Code § 4801(a); *In re the Marriage of Rosan,* 24 Cal.App.3d 885; *In re the Marriage of Bozeman,* 31 Cal.App.3d 372, 378; and see *Hall v. Hall,* 42 Cal. 2d 435.)

Civil Code section 4801(a) provides that "the court may order a party to pay for the support of the other party any amount, and for such period of time, as the court may deem just and reasonable having regard for the circumstances of the respective parties, including the duration of the marriage, and the ability of the supported spouse to engage in gainful employment. . . ."

The trial court properly took into account the fact that the petitioner's income was subject to unusually heavy demands because of his paraplegic condition, including the necessity of having attendant care. Furthermore, petitioner, in order to pay to the respondent the sum necessary to equalize the community property division, contemplated a new encumbrance on the residence on Maltman which encumbrance would have to be repaid in monthly installments.

It appears that the trial court, in awarding support to the respondent until she was 62 years of age, elected to consider the relationship as one existing since

1942 rather than 1968. It concluded, however, that respondent's record of employment and relatively good health would not preclude her from again seeking employment, and the award was made on that basis. We find no abuse of discretion here.

The judgment is affirmed.

NOT FOR PUBLICATION.

Jefferson, *J.*

We concur:
Files, *P. J.*
Dunn, *J.*

Clay Robbins, Jr., Clerk of the Court of Appeal, Second Appellate District, State of California, do hereby certify that the preceding is a true copy of the opinion filed in the cause as shown by the record of my office.

CLAY ROBBINS, JR., Clerk
By /s/ R. N. Wilson
Chief Deputy

[Seal]

APPENDIX "B."

Constitution of the United States Annotated.

Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA CIVIL CODE, Section 5103: Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by Title 8 (commencing with Section 2215) of Part 4 of Division 3.

CALIFORNIA CIVIL CODE, Section 5110: All other real property situated in this state and all other personal property wherever situated acquired during the marriage by a married person while domiciled in this state, and property held in trust pursuant to Section 5113.5, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the in-

strument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife and that when a single family residence of a husband and wife is acquired by them during marriage as joint tenants, for the purpose of the division of such property upon dissolution of marriage or legal separation only, the presumption is that such single family residence is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property.

In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that the real property was community property, or to recover the real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

As used in this section, personal property does not include and real property does include leasehold interests in real property.

APPENDIX "C."

Clerk's Office, Supreme Court, 4250 State Building.
San Francisco, California 94102

Nov. 28, 1973

I have this day filed Order HEARING DENIED.

In re: 2 Civ. No. 40176 Shreves vs. Shreves.

Respectfully,

G. E. BISHEL
Clerk